

A RESOLUTION BY

CITY UTILITIES COMMITTEE

03-R-1309

A RESOLUTION TO AUTHORIZE PAYMENT OF STIPULATED PENALTIES IMPOSED BY THE ENVIRONMENTAL PROTECTION DIVISION OF THE DEPARTMENT OF NATURAL RESOURCES OF THE STATE OF GEORGIA (EPD) IN THE AMOUNT OF TEN THOUSAND HUNDRED DOLLARS AND 00/100 (\$10,000.00) AS STIPULATED PENALTIES FOR VIOLATIONS OF THE GEORGIA RULES AND REGULATIONS FOR WATER QUALITY CONTROL ON AUGUST 14, 2003; TO IDENTIFY THE SOURCE OF FUNDING; AND FOR OTHER PURPOSES.

WHEREAS, the City has experienced a violation of Georgia Rules and Regulations for Water Quality Control as set out in Exhibit "A" hereto; and

WHEREAS, on August 14, 2003 EPD investigated a complaint of a piped discharge causing bank erosion along Peachtree Creek at the Nancy Creek Tunnel Project site at RM Clayton WRC; and

WHEREAS, on August 21, 2003 EPD issued a Notice of Violation that required a formal plan of action for eliminating the discharge to Peachtree Creek, for stream bank erosion, and for handling tunnel water at other construction sites associated with the Nancy Creek project; and

WHEREAS, the Department of Watershed Management of the City does not dispute the fact these violations of the Georgia Water Quality Control Act did occur; and

WHEREAS, the payment to EPD of this assessment by the City does not constitute a finding or adjudication, is not to be evidence of a violation of state or federal laws by the City, nor does the City by its consent agree to any violations of state or federal laws or admit any liability to any third party or parties; and

WHEREAS, funds for this purpose are available in account number 2J01 529017 Q30001; and

WHEREAS, it is deemed to be in the interest of the City to accept the proposed expedited enforcement compliance order and to pay the incident assessments to them.

NOW, THEREFORE, BE AND IT IS RESOLVED BY THE COUNCIL OF THE CITY OF ATLANTA, as follows:

Section One: That the Chief Financial Officer of the City is authorized to issue a check in the amounts of Ten Thousand Hundred Dollars and 00/100 (\$10,000.00) payable to the **State of Georgia** as penalties imposed pursuant to the Expedited Enforcement

Compliance Order at the discretion of the Environmental Protection Division of the Department of Natural Resources of the State of Georgia; and

Section Two: That the said payments be chargeable to Account Number 2J01 529017 Q30001.

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

NOV 05 2003

CERTIFIED MAIL 7002 0860 0005 3228 4481

RETURN RECEIPT REQUESTED

REF: 4WM-WPEB

Mr. Jack Ravan, Commissioner
Department of Watershed Management
City of Atlanta
55 Trinity Avenue, S.W.
Atlanta, Georgia 30303

SUBJ: Indian Creek Trunk Relief Sewer Project
Demand for Stipulated Penalties
Civil Action File No. 1:98-CV-1956-TWT

Dear Mr. Ravan:

On February 14, 2003, the City of Atlanta notified EPA and EPD that the Indian Creek Trunk Relief Sewer Project (Project) would not be completed by the February 28, 2003 deadline as required by Exhibit C of the First Amended Consent Decree (FACD). On July 18, 2003, the City notified EPA and EPD that substantial completion of the Project was achieved on July 18, 2003, some 140 days past the deadline.

The City is subject to substantial penalties for its failure to complete the Project by the deadline. The FACD provides for the possibility of the following enforcement options:

- Assessment of daily stipulated penalties on a time-escalated scale as follows:

<u>Period of Violation</u>	<u>Penalty Per Day</u>
1-30 days	\$2,000/day
31-60 days	\$5,000/day
over 60 days	\$8,500/day

Based on the 140-day default, this could result in a total penalty of up to \$890,000.

- A moratorium against any new sewer connections (either within the entire Peachtree Creek sewer basin or just the North and South Fork sewersheds of that basin).

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- A flat monetary penalty of \$1,000,000.
- A combination of a connection moratorium with the \$1,000,000 monetary penalty.

On February 18, 2003, EPA and EPD jointly inspected the Project site and have subsequently investigated the reasons for the City's failure to meet this deadline and monitored the progress toward completion of the Project. As part of our investigation, EPA and EPD also looked at the City's schedules for other sewer relief projects. Before making a final enforcement decision regarding the Indian Creek Project default and before the City missed any additional major construction deadline, EPA and EPD requested in a July 18, 2003 letter, an analysis by the City of any significant obstacles that it foresaw potentially causing any future construction project deadline to be missed. The City was requested to include in this analysis any other technical, fiscal or organizational problem that may hinder the City's ability to meet future construction deadlines as well as suggested or potential solutions to overcome these obstacles.

On August 28, 2003, the City submitted the response signed by Mayor Franklin. This was followed by our September 3, 2003 meeting with representatives of the City's Department of Watershed Management and Department of Procurement. Based on the review of the City's response, we noted the thoroughness of the report given the time constraints placed on its submittal. The City took a comprehensive look at the factors leading to the failure to meet the Indian Creek Project deadline.

The report noted that the Indian Creek Project was split into four segments, largely due to financial considerations. The decision to move forward with segments one and two did not occur until 359 days after the effective date of the FACD. At that point it was recognized that the 10-year old designs which had been awaiting funding since their completion would have to be redone due to the large changes that had occurred in Buckhead since the designs had been completed. The ensuing redesign and construction procurement then delayed the Project 351 additional days but segments one and two were constructed in 269 days, meeting the FACD deadline. However, even though the City discovered the inadequacy of the design for segments one and two, it waited an additional 170 days before moving forward with the necessary redesign of segments three and four. With the time required for redesign and the construction procurement delay of 347 days, this meant that construction of segments three and four did not begin until May 24, 2002, some 887 days after the effective date of the FACD. When the construction contractor encountered delays due to unfamiliarity in tunneling in the Atlanta-type soils, the result was the missed FACD deadline.

We note that Section IV.A of the FACD mandates a responsibility for meeting its provisions upon "...the Defendant (City of Atlanta) and its officials, officers, directors, employees..." While the City as an entity is responsible for the actions of all of its elected officials, employees, and contractors, we found that the decisions that resulted in the failed deadline occurred relatively early during the City's efforts to meet the terms of the FACD. We

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also note that many of the officials responsible for those decisions are no longer involved in the implementation of the projects under the FACD. In fact, it was evident in our review of the Project delay that the City made a significant effort to minimize the delay and to ameliorate the effects of the delay once the problem was identified in late 2002. This effort included construction of a surface pumping and force main system to temporarily transport peak flows around the incomplete sections of the relief sewer, which was a substantial step to control the risk of unpermitted discharges in the Indian Creek area until the Project was completed. In addition, we noted that the City mandated that the contractor increase their level of effort. As a result, the contractor employed additional personnel, additional equipment, and increased work schedules to complete the project.

As noted above, EPA and EPD has the discretion to assess daily stipulated penalties totaling \$890,000 for the failure of the City to meet the FACD deadline. Considering the factors noted above, EPA and EPD hereby elect to assess at this time daily stipulated penalties in the amount of \$100,000 which corresponds to a 38-day delay past the deadline. However, EPA and EPD hereby reserve their rights to assess the remaining \$790,000 in penalties contingent upon the City's future compliance with the terms of the FACD.

More specifically, we note that an SSO-reduction project similar to the Indian Creek Project is included on the list of capital projects in Appendix C of the FACD. This project, the Nancy Creek Tunnel and Pump Station, has a deadline of December 31, 2005 to be completed. If the City meets this deadline, EPA and EPD will refrain from assessing the remaining \$790,000 in stipulated penalties for the default related to the Indian Creek Trunk Relief Sewer Project. However, if the Nancy Creek Project deadline is missed, EPA and EPD may assess the remaining \$790,000 in stipulated penalties for the default related to the Indian Creek Trunk Relief Sewer Project as well as any penalties which may be assessed due to the City's failure to meet the Nancy Creek Tunnel and Pump Station deadline. **Please recognize that the City should not expect this degree of consideration in the future.**

Payment of the \$100,000 stipulated penalty demanded herein should be made within sixty (60) days of the date of this letter in accordance with Section XI.K of the FACD, as amended.

Beyond the issue of the failure by the City to meet the Indian Creek Project deadline, the City's August 28th response identified other challenges that it may face in meeting the remaining terms of the FACD and the CSOCD. In our review of the City's letter, we found the City's analysis to be a candid and thorough portrayal of these challenges. We appreciate the City's effort to identify recommended solutions to these identified challenges which could affect the success of all remaining projects.

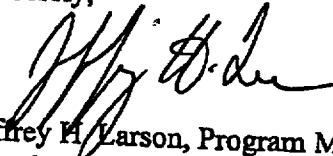
Thank you for the time and effort invested in the response to our request as well as the follow-up meeting. These efforts helped to clarify the City's approach to ensuring future compliance with the terms of the consent decrees.

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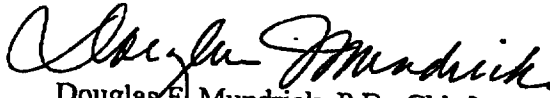
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If you have any questions, please contact Doug Mundrick at (404) 562-9328 or Jeff Larson at (404) 362-2680.

Sincerely,



Jeffrey H. Larson, Program Manager
Permitting, Compliance, and Enforcement Program
Georgia Environmental Protection Division



Douglas F. Mundrick, P.E., Chief
Water Programs Enforcement Branch
Water Management Division

cc: See Attached List

EXHIBIT A

List of Carbon Copies:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

United States Attorney
Northern District of Georgia

Department of Law
State of Georgia

Georgia Environmental Protection Division
Permitting, Compliance and Enforcement Program

Linda K. DiSantis, Esq.
Department of Law
City of Atlanta

Robert Hunter, Deputy Commissioner
Department of Watershed Management
City of Atlanta

Joseph Basista, P.E.
Program Management Team
Montgomery Watson/Khafra, A Joint Venture